Filed 3/8/11 In re Z.W. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re Z.W., a Person Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. S.J., Defendant and Appellant.	C065746 (Super. Ct. No. JD227486)

Mother (S.J.) appeals from the juvenile court's orders reinstating the juvenile court's orders terminating her parental rights and implementing a permanent plan of adoption as to minor Z.W. (who was born in late 2007). (Welf. & Inst. Code, § 366.26.)[1] Father has not appealed.

[1] All further undesignated statutory references are to the Welfare and Institutions Code.

Mother's sole contention on appeal is that the Department of Health and Human Services failed to comply with the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

In May 2008, the Sacramento County Department of Health and Human Services (Department) removed the minor from the custody of mother and father. In October 2008, the juvenile court sustained the jurisdictional allegations and denied reunification services to both parents. In May 2009, the court terminated the parents' rights to the minor.

Mother appealed from that order, claiming the juvenile court failed to comply with ICWA. (*In re Z.J.* (Jan. 8, 2010, C062424) [nonpub. opn.].)[3] As stated in this court's opinion, mother identified the following errors in the Department's ICWA notices: "(1) the notices failed to list the relative through whom mother's purported Indian heritage derived, despite [the Department] having been given the information by mother and mother's cousin; (2) [Department] failed to satisfy the inquiry provisions as to the father's purported ancestry with the Blackfeet Nation; and (3) they failed to list father's ancestral information." (*Ibid.*)

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[2] Because the sole issue on appeal is ICWA compliance, the factual and procedural background is abbreviated.

[3] In November 2009, the minor's true name was found to be "Z.W.," not "Z.J."

The Department conceded its errors on appeal and this court vacated the order terminating parental rights and remanded the matter "with directions to order the Department to: (1) fully identify the relative through whom mother's purported Indian heritage derives; (2) inquire further into the father's purported Indian ancestry; and (3) include the father's ancestral information in the ICWA notice." (*In re Z.J.*, *supra*, C062424.)

While that appeal was pending, the juvenile court reappointed counsel to assist the parents with the ICWA issues and set an ICWA compliance hearing for December 11, 2009. At the compliance hearing, the Department indicated it had "interviewed the relatives" of the parents and it would send new ICWA notices to the tribes.

To investigate mother's claim of Indian ancestry, on December 1, 2009, the Department again interviewed mother and mother's paternal aunt, E.J. E.J. indicated that the minor's great-great-grandfather's name was John Jefferson, and he was reportedly Creek Indian, and his roll number was "Freedom Roll . . . 103." E.J. also said that the minor's great-great-great-grandfather's name was James Jefferson and her great-grandfather's name was Jim J. E.J. said she did not know if Jim J. was Native American, and did not know of anyone in the family who lived on an Indian reservation.

E.J. also confirmed there was Choctaw and Creek ancestry from the maternal grandfather's mother, but could not say where the Choctaw ancestry originated from. Mother and E.J. confirmed

the spelling of all of the names they had provided, but had no further information to give. E.J. said she would continue trying to obtain information and would contact the Department if she learned anything new.

Several days later, mother contacted the Department by telephone. Mother had her maternal aunt on the telephone as well, but the aunt did not give her name.[4] The aunt confirmed that the minor's maternal great-great-great-grandmother was "full Indian," although she did not know her name or her tribe. Mother and her aunt said "they had provided all the information known to them regarding their Native American ancestry."

Mother later provided the Department with the phone number for the minor's paternal grandfather, "L.L.W." The Department contacted L.L.W., who said his ancestry was Choctaw, not Blackfeet as previously reported. He explained the Choctaw ancestry was from his mother's side of the family, but his mother was not enrolled in any tribe and neither was he. He also said he did not know if the minor's paternal grandmother, deceased, was Native American.

The Department attempted to reach father to obtain further information regarding the paternal grandmother, but father could not be located and he did not respond to their requests.

On December 14, 2009, the Department sent another ICWA-030 notice to the Bureau of Indian Affairs (BIA) and the parents by

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[4] At a hearing on January 15, 2010, counsel for mother identified the maternal aunt by name, Z.D.

certified mail. Notices also were sent to the Choctaw, Creek, Cherokee, and Blackfeet tribes. Included in the revised notice was a family tree for the minor, which provided more detailed information about the minor's potential Indian ancestry. The revised notice included the maternal grandmother's name and place of birth, as well as the maternal great-great-grandfather's name, state of birth, roll number, and tribe.

At the January 15, 2010 ICWA compliance hearing, mother made several corrections to the December 14, 2009 ICWA-030 notice. She stated that the maternal grandmother's first name was "Glinda," not "Glenda," her birthdate was May 18, 1957, and her date of death was October 13, 1974. Mother also corrected the minor's maternal grandfather's middle name: "the mother's biological father's correct middle name is Gayle, G-a-y-l-e, as opposed to Dale," and the date of his death was December 5, 1981. Mother also stated that although the minor's great-grandmother passed away in Reno, she actually lived in Sacramento. Mother then confirmed the remaining information was accurate.

On January 28, 2010, the Department sent via certified mail revised pages one, three and 10 of the ICWA-030 notice to mother, the BIA, four Choctaw tribes, three Cherokee tribes, five Creek tribes, and the Blackfeet tribe. The revised pages were accompanied by a cover letter indicating the changes had been made because mother had made additional corrections to the

information that had been provided.[5] The Department failed, however, to change page four of the ICWA-030 notice to reflect that the minor's great-grandmother's former residence was Sacramento, not Reno.

On March 5, 2010, father provided the court with further information regarding his ancestry, including his mother's maiden name. Father also gave the Department contact information for his father. Mother, who was present at the hearing and represented by counsel, confirmed that the information contained in the previous ICWA-030 notice was correct.

The Department later again spoke with the minor's paternal grandfather, L.L.W., and learned that the paternal grandmother did not have Indian ancestry. The paternal grandfather confirmed the remainder of the information provided regarding his side of father's family, but said that the minor's paternal great-grandmother was from Texas, not Oklahoma as indicated on the previous ICWA-030 notice. On March 8, 2010, two days before this court issued the remittitur in the prior appeal, but three months after the opinion was filed, a corrected ICWA-030 notice, including father's new information, was sent to the same tribes previously noticed and the BIA.

On April 20, 2010, and again on April 30, 2010, the Department filed declarations documenting the tribes' receipt of

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[5] Father's residence was listed as "unknown."

the March 8, 2010 revised ICWA-030 notice. Another ICWA compliance hearing was then held on May 7, 2010. The compliance hearing, also a "Return on Remittitur" hearing, was continued to May 21, 2010 "to let the requisite time pass in order for the notice to be perfected and the tribes to respond."

Mother, who was present and represented by counsel at the hearing, raised some concerns regarding the March 8, 2010 notice. She again indicated that the correct spelling of her mother's name was "Glinda," not "Glenda," although Z.D. had told the Department paralegal her name was spelled "Glenda." The court confirmed the notice indicated that the minor's maternal grandmother's name was either "Glinda or Glenda." Mother also stated that her father's name is "Larry G[.] not D[.]." Reading the March 8, 2010 notice, the court responded: "So it says Larry G[.] or Dale J[.].

"[Mother's Counsel]: Having both there and having the tribe search there is no harm, no foul.

"THE COURT: Okay. Good. That's proper to have both."

Finally, counsel for mother indicated that the minor's maternal great-grandmother lived in Sacramento, but died in Reno. As he spoke, counsel for mother recognized that the March 8, 2010 notice correctly reflected that information: ". . . she had this address in Sacramento but passed away in Reno, which is reflected at the bottom. . . . So it does not seem -- this is not additional or corrected information. It's just sort of clarification."

On May 21, 2010, the court held its final ICWA compliance hearing, along with the return on remittitur and a postpermanency review for the minor. Neither mother nor father was present at the hearing; however, both were represented by counsel. The following exchange occurred on the record:

"THE COURT: . . . And I have received, read and considered the remittitur issued by the Third District Court of Appeals [*sic*], the ICWA compliance hearing, post permanency review hearing report submitted by the Department. It does appear that in regard to the Indian Child Welfare Act tribes have been noticed and re-noticed and subsequently noticed. And we have waited 60 days from all of those. We have some negative response and some absence of response.

"[County Counsel], did you want to be heard on the remittitur or ICWA issues?

"[County Counsel]: No. Just -- I am just requesting that the Court find that based on the evidence before the Court and the declaration dated May 20th that the Court find that the ICWA -- make the ICWA finding that ICWA is not applicable in this matter.

"THE COURT: Okay. [Counsel for the minor]?

"[Counsel for the Minor]: I submit on that.

"THE COURT: Okay. [Counsel for father]?

"[Counsel for Father]: Submitted.

"THE COURT: [Counsel for mother]?

"[Counsel for Mother]: Submit on that.

"THE COURT: Then the Court will find that the Department has followed up as directed by the Appellate Court, fully identifying the relative from whom the mother's Indian heritage purportedly derives, inquiring into the father's Indian ancestry, including the father's information in the ICWA notice. We have waited 60 days. So the Court at this time will again find that the child is not an Indian Child within the meaning of the Indian Child Welfare Act and shall re-instate the order terminating parental rights."

DISCUSSION

A. Notice Was Sent to the Correct Agents for Service

Mother contends the Department sent the March 8, 2010 ICWA notice to the incorrect agents for receipt of ICWA notice for the Choctaw Nation of Oklahoma, the Mississippi Band of Choctaw Indians, the Muscogee (Creek) Nation, the Thlopthlocco Tribal Town, the Eastern Band of Cherokee Indians, the Blackfeet Tribe of Montana, the Kialegee Tribal Town, the Poarch Band of Creek Indians, the Cherokee Nation of Oklahoma, and the United Keetoowah Band of Cherokee Indians.

In support of her contention, mother relies on the list of agents published for service of process under the ICWA by the BIA on May 19, 2010. (75 Fed.Reg. 28104 et seq. (May 19, 2010).) Because the new list was published prior to the final ICWA compliance hearing on May 21, 2010, and the agents for service changed, she contends the notices were improper. Mother's contention is without merit.

The last revised ICWA notices were sent on March 8, 2010, two and a half months before the new list of agents was published in the Federal Register. The last tribe to receive the March 8, 2010 notice received that notice on March 17, 2010, nearly two months before the new list was published. Thus, the notices were correct at the time they were sent, and they were correct at the time they were received.[6]

Furthermore, while the designated agent for some of the tribes may have changed, the addresses did not.[7] (Compare 74 Fed.Reg. 19326 et seq. (Apr. 28, 2009) with 75 Fed.Reg. 28104 et seq. (May 19, 2010).) Accordingly, we find no error.

The holding in *In re J.T.* (2007) 154 Cal.App.4th 986 (*J.T.*) does not alter our conclusion. In *J.T.*, the juvenile court found the social services agency had complied with ICWA notice requirements even though notices had not been sent to all of the tribes in which the mother claimed ancestry. (*Id.* at pp. 989,

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[6] The May 19, 2010 Federal Register lists as the registered agent for the Poarch Band of Creek Indians, "Carolyn M. White, Executive Director." (75 Fed.Reg. 28114 (May 19, 2010).) The April 28, 2009 Federal Register lists the same name. (74 Fed.Reg. 19336 (Apr. 28, 2009).) The Department's declaration, upon which appellant relies, indicates the March 8, 2010 notice to the Poarch Band of Creek Indians was sent to "Karen Rackard." In fact, the return receipt indicates it was sent to "Carolyn Rackard, ICWA Dept[.] of Family Services." The address is the same and only the first name is different; the deviation is de minimis.

[7] Mother contends the notice to the Mississippi Band of Choctaw Indians was sent to "P.O. Box 6010" instead of "P.O. Box 6050." In fact, the record indicates the notice was sent to "P.O. Box 6050."

990-991, 992.) In reaching its decision, the juvenile court relied on the notice requirements in effect at the time the ICWA notices were sent. Prior to the ICWA compliance hearing, however, section 224.2 was enacted -- changing the notice requirements. (*J.T.*, *supra*, 154 Cal.App.4th at pp. 991-992, 993-994.)

Under section 224.2, the social services agency was required to send ICWA notices to all of the federally recognized tribes in which the mother claimed ancestry. (*J.T.*, *supra*, 154 Cal.App.4th at p. 994.) It was no longer sufficient to send notice only to the BIA. (*Ibid.*) The appellate court concluded the juvenile court erred because the juvenile court was required to follow the law in effect at the time of the compliance hearing, not at the time the notices were sent. (*Id.* at pp. 991-992.)

Unlike the change in the law in *J.T.*, the changes here were not substantial. Here, the BIA published its annual list of registered agents for service and their addresses in the Federal Register after the March 8, 2010 notice was sent but prior to the ICWA compliance hearing. The notice requirements did not change. In some instances, the person to whom the notice should be sent did change, but not until after the notices had already been received.

B. Mother Lacks Standing to Contest the Sufficiency of Notice to Father

Mother contends the Department failed to properly serve father with the March 8, 2010 ICWA notice. Mother lacks

standing to raise this issue on appeal. (*In re Jeffrey A.* (2002) 103 Cal.App.4th 1103, 1108-1109.)

C. Mother Has Forfeited Her Claims of Error Regarding the Content of the March 8, 2010 ICWA Notice

Mother complains of the following deficiencies in the March 8, 2010 ICWA notice: (1) the Department failed to include the roll number for the minor's great-great-great-grandfather, James Jefferson; (2) the Department omitted mother's claim of Blackfeet ancestry; (3) the notice lists mother's biological father as Larry Gale (or Dale) J., and his name is Larry "Gayle" J.; (4) the notice lists the paternal great-grandmother as "possibly born in Oklahoma," but she was from Texas; and (5) the notice was incorrect with respect to the birthplace of the minor's paternal grandfather, L.L.W.[8]

Mother was not present at the final ICWA compliance hearing. However, she was represented by counsel and her counsel failed to raise these objections at the hearing. In fact, he agreed the ICWA notice requirements had been complied with. Mother has thus forfeited these claims on this, her second appeal.

In *In re X.V.* (2005) 132 Cal.App.4th 794 (*X.V.*), the Court of Appeal, Fourth Appellate District, Division One, determined, "As a matter of respect for the children involved and the judicial system, as well as common sense, it is incumbent on

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[8] Mother raised this issue for the first time in her reply brief.

parents on remand to assist the Agency in ensuring proper notice is given." (*Id.* at p. 804.) There, the court considered whether, after a first appeal challenging the adequacy of the ICWA notice, the parents could challenge in a second appeal the adequacy of the ICWA notice issued on remand after failing to raise their objections in the juvenile court. (*Id.* at pp. 801, 803.) The court explained that in the parents' first appeal, the case was remanded "for the specific and sole purpose of affording proper notice under the ICWA; . . ." (*Id.* at p. 803.) On remand, "the juvenile court ordered the Agency to give proper notice; the Agency obtained information on Indian heritage from the paternal grandmother and sent ICWA notices to the BIA and numerous tribes, and the ICWA notices, return receipts and responses were filed with the court; . . ." (*Ibid.*)

The parents in *X.V.* then failed to appear at the hearing in which their parental rights were terminated, though both were represented by counsel; neither parent objected to the adequacy of the ICWA notices. (*X.V., supra*, 132 Cal.App.4th at p. 803.) Family members for the parents were present at the termination hearing, but none of them objected to the adequacy of the ICWA notices either. (*Ibid.*)

In analyzing the parents' second appeal challenging the adequacy of the ICWA notices issued on remand, the court balanced "the interests of Indian children and tribes under the ICWA, and the interests of dependent children to permanency and stability, . . ." (*X.V., supra*, 132 Cal.App.4th at p. 804.) In doing so, the court considered that the children had been in the

dependency system for more than three years and their permanent placement had been substantially delayed by the two appeals. (*Ibid.*)

Thus, the court concluded: "We are mindful that the ICWA is to be construed broadly [citation], but we are unwilling to further prolong the proceedings for another round of ICWA notices, to which the parents may again object on appeal. . . . We do not believe Congress anticipated or intended to require successive or serial appeals challenging ICWA notices for the first time on appeal. . . . '[a]t some point, the rules of error preservation must apply or parents will be able to repeatedly delay permanence for children through numerous belated ICWA notice appeals and writs.'" (*X.V., supra,* 132 Cal.App.4th at pp. 804-805.)

The same principles apply here. This is not a case where no notice was sent or the Department failed to include known information. The Department made repeated inquiries. The information that was forthcoming was provided to all of the tribes in four separate notices. Seven notices were sent to the BIA. The inadequacies that mother now claims are fatal flaws could easily have been corrected had they been brought to the juvenile court's attention.

Accordingly, under the circumstances of this case, we conclude that the issue of accuracy of the March 8, 2010 notice has been forfeited.

D. The Tribes' Responses or Failure to Respond Do Not Indicate Error

Mother contends the responses from the Kialegee Tribal Town and Poarch Band of Creek Indians are insufficient because they do "not state the child's eligibility for membership as opposed to enrollment." This court has already found this specific claim is forfeited by a parent's failure to raise the issue in the juvenile court. (*In re William K.* (2008) 161 Cal.App.4th 1, 11-12.) Here, mother raised no objection to these responses in the juvenile court. Therefore, she has forfeited her claim on appeal.

Mother further complains that certain tribes failed to respond to the March 8, 2010 ICWA notice, thus indicating there was error in serving the notice. As discussed above, the notices were sent to the correct addresses and the correct agent for service at the time they were sent and received. (See 74 Fed.Reg. 19335-19336, 19341 (Apr. 28, 2009).) The record also includes certified mail receipts from the Mississippi Band of Choctaw Indians, the Muscogee (Creek) Nation, the Blackfeet Tribe of Montana, and the United Keetowah Band of Cherokee Indians. The record thus supports the juvenile court's finding that the notices were actually received by the tribes.

As such, on this record, the tribes' failure to respond is not evidence they did not receive the March 8, 2010 notice. Rather, it is "tantamount to [a] determination[] that the minor was not an 'Indian child' within the meaning of [ICWA]."

(§ 224.3, subd. (e)(3); *In re Levi U.* (2000) 78 Cal.App.4th 191, 198.)

DISPOSITION

The orders of the juvenile court are affirmed.

MURRAY, J.

We concur:

RAYE, P. J.

BUTZ, J.